Million Westlink Sdn Bhd & Anor v Maybank Investment Bank Bhd & Ors and others appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02 (IM)(NCC)-1816–10 OF 2015, W-02 (IM)(NCC)-1817–10 OF 2015 AND W-02 (IM)(NCC)-1818–10 OF 2015

LIM YEE LAN, BADARIAH SAHAMID AND HARMINDAR SINGH JJCA

13 JULY 2017

Contract — Terms — Sale and purchase agreement — Claim for balance purchase price in event of default — Whether claim within contemplation of parties to contract — Whether sum payable agreed to — Whether award of balance of purchase price as compensation consistent with s 18(4) of the Specific Relief Act 1950 — Whether damages ought to be assessed

Gula Perak Bhd ('GPB') had issued five year redeemable convertible secured notes 2002/2007 with an aggregate nominal value of RM288,820,655 ('the notes'). Five banks, the first to fifth respondents, held about 48.54% of the notes whilst the remaining notes were initially held by four other financial institutions, as well as various other individuals with very small holdings of the notes ('the noteholders'). A trust deed ('trust deed') was executed upon which a trustee, the sixth respondent, was appointed for all the noteholders. The second appellant (formerly the Managing Director of GPB) together with one Pavilion Yields Sdn Bhd ('Pavilion Yields') and one Greenpower Value Sdn Bhd ('Greenpower') acquired 50.25% of the notes from, inter alia, the other financiers. Pavilion Yields and Greenpower were parties aligned to or connected with the second appellant and were friendly to GPB ('Tan Sri Lim Group'). As security for GPB's liability under the notes, lands were charged to the trustee who held them as trustee for all the noteholders. However, GPB defaulted in its payments under the notes and failed to redeem all the notes by the maturity date. The noteholders, thus, passed a resolution to declare that an event of default had occurred and directed the trustee to, inter alia, take all necessary actions to recover the amounts owing by GPB under the notes, which included the realisation of all securities given to the trustee ('the 2010 resolution'). Pursuant to the 2010 resolution, the trustee proceeded with charge actions in respect of the charged lands and GPB was subsequently ordered to be wound up and liquidators were appointed over GPB. Pursuant to a proposal by Pavilion Yields for the passing of an ordinary resolution to revoke the 2010 resolution and to direct the trustee to discontinue all legal actions in respect of the notes, the trustee notified the noteholders that it would be convening a noteholders meeting. However, it was later notified that such resolution was to be passed by a special resolution (requiring 75% majority)

instead of an ordinary resolution, in accordance with the terms of the trust deed. Pursuant thereto, Pavilion Yields, Greenpower and the banks respectively filed actions to determine whether the proposed resolution was to be carried by way of an ordinary or special resolution. The banks and the Tan Sri Lim Group then agreed to try to resolve the matter, resulting in a consent order. Pursuant to the consent order, the banks, the trustee and the Tan Sri Lim Group agreed, inter alia, for the trustee to postpone the auction of one of the lands and that the second appellant and/or parties related to him would negotiate a buyout of the notes held by the banks. Settlement terms were finally resolved wherein the timelines for the staggered payments and completion of the proposed sale were agreed to by the parties. The finalised terms were reflected in the sale and purchase agreement ('SPA') and the guarantee ('guarantee') executed between the banks and appellants. The first appellant made payments pursuant to the SPA. However, the cheque for the fourth instalment was dishonoured resulting in the issuance of a notice of event of default by the banks to the first appellant and demanded the first appellant to remedy the default within 14 days from the date of delivery of the notice. Due to the failure by the first appellant to remedy the default, the banks proceeded to file an action to enforce the SPA and the guarantee. Meanwhile, as provided under the express agreed terms of the SPA, and in accordance with the irrevocable instructions of the Tan Sri Lim Group furnished to the trustee, the trustee continued with the charge actions for recovery of the outstanding notes upon notification by the banks of the default under the SPA. The banks' action was for specific performance of the SPA for the first appellant to complete the purchase of the bank notes (or in the alternative, damages thereunder) and to enforce the guarantee by the second appellant for amounts due and owing under the SPA, whilst the appellants counterclaimed against the banks and the trustee. The High Court allowed the banks' application for summary judgment against the appellants for a liquidated sum of RM124.489,509.27 and struck out the appellants' counterclaim against the banks and the trustee.

Held, dismissing the appeals with costs:

(1) The judicial commissioner ('JC'), in dismissing the prayer by the respondents for specific performance, was exercising his discretion as afforded by s 21 of the Specific Relief Act 1950 ('the SRA'). The JC merely declined to order specific performance and instead chose to order damages as the JC retained the right to order compensation in the alternative. Further, s 18 of the SRA permits the court to order compensation for breach of contract, in addition to, or in substitution to, a person seeking specific performance. Therefore, no criticism could be levelled at the respondents for mounting their claim for specific performance and also for seeking damages for breach of contract in lieu of specific performance as a sort of breach of the doctrine of election (see paras 37–39).

(2) Although s 18 may appear to be in conflict with s 28, the latter applies where the suit is only for specific performance. Section 28 does not apply to restrict s 18 which is a specific provision authorising compensation for breach (*Balbeer Singh a/l Karam Singh & Ors v Sentul Raya Sdn Bhd* [2014] 5 MLJ 491). The banks were not claiming for any remote and indirect loss or damage or anything in addition to what was within the contemplation of the parties to the contract. The balance purchase price claimed by the banks was the agreed sum payable by the appellants in the event of the appellants' default. It is trite law that whether a sum stated in a contract is a penalty or liquidated damages is a question of construction of the terms and circumstances of each particular contract. Therefore, the argument that the stipulated sum was a penalty, was without merit. The JC's decision to award the balance of the purchase price as compensation was consistent with s 18(4) SRA as assessment is left to the discretion of the court. The balance purchase price claimed by the banks was the agreed sum payable by the appellants resulting from the appellants' default. There was therefore no necessity for damages to be assessed in the usual way as the amount of liquidated damages was agreed in the event of default (see paras 40 & 44–45).

(3) The trustee had complied with the consent order by not proceeding with the foreclosure proceedings in order to enable the appellants to enter into negotiations. It was only after the default of the SPA that the trustee applied to continue with the foreclosure proceedings as was its duty under the trust deed. The trustee acted for the benefit of the noteholders and his actions were to recover the amounts outstanding under the notes regardless of who were the owners of the notes. Proceeds recovered would be for all noteholders including public investors. There was no breach by the trustee or conspiracy with the banks. In fact, in view of the first appellant's default under the SPA, the banks had a legitimate right of enforcement under the SPA and it was farfetched to assert that there was a conspiracy by the banks and the trustee to injure the appellants. The trustee had at all times acted reasonably and in compliance with the terms under the trust deed, the terms of the charge and the instructions of the noteholders. This was clearly established by the undisputed documentary evidence. The High Court was therefore right to conclude that the appellants' counterclaim was obviously unsustainable. In the circumstances, there was no appealable error to warrant appellate interference (see paras 47–49).

[Bahasa Malaysia summary

Gula Perak Bhd ('GPB') mengeluarkan nota jaminan yang boleh ditebus tukar 2002/2007 dengan nilai agregat nominal RM288,820,655 ('nota-nota'). Lima bank, responden-responden pertama hingga kelima, memegang kira-kira 48.54% nota-nota tersebut, manakala baki nota-nota asalnya dipegang oleh

A empat institusi kewangan yang lain, serta pelbagai individu lain dengan pegangan kecil nota-nota tersebut ('pemegang-pemegang nota'). Satu surat ikatan amanah ('surat ikatan amanah') dimeterai di mana pemegang amanah, responden keenam, dilantik bagi kesemua pemegang-pemegang nota. Kemudian perayu kedua (bekas Pengarah Urusan GPB) bersama-sama dengan B Pavilion Yields Sdn Bhd ('Pavilion Yields') dan Greenpower Value Sdn Bhd ('Greenpower') memperoleh 50.25% nota-nota daripada, antara lain, pembiaya-pembiaya kewangan lain. Pavilion Yields dan Greenpower adalah pihak-pihak yang sejajar dengan atau berkaitan dengan perayu kedua dan bersahabat dengan GPB ('Kumpulan Tan Sri Lim'). Sebagai jaminan untuk C liabiliti GPB bawah nota-nota itu, tanah-tanah tersebut digadaikan kepada pemegang amanah yang memegangnya bawah amanah bagi pihak kesemua pemegang nota. Walau bagaimanapun, GPB ingkar dalam pembayarannya bawah nota dan gagal menebus kesemua nota sebelum tempoh matang. Pemegang-pemegang nota, oleh itu, meluluskan satu resolusi untuk D mengisytiharkan bahawa satu peristiwa keingkaran berlaku dan mengarahkan pemegang amanah untuk, antara lain, mengambil kesemua tindakan perlu untuk mendapatkan semula jumlah yang dihutang oleh GPB bawah nota-nota, yang termasuk merealisasi kesemua jaminan yang diberi kepada pemegang amanah ('resolusi 2010'). Berikutan resolusi 2010, pemegang E amanah meneruskan dengan tindakan gadaian berkaitan dengan tanah-tanah yang digadai dan GPB kemudiannya diperintahkan untuk digulung dan pelikuidasi dilantik bagi GPB. Berikutan cadangan oleh Pavilion Yields untuk meluluskan resolusi biasa untuk membatalkan resolusi 2010 dan mengarahkan pemegang amanah menghentikan kesemua tindakan undang-undang F berhubung nota-nota tersebut, pemegang amanah memaklumkan pemegang-pemegang nota bahawa ia akan menjalankan mesyuarat pemegang-pemegang nota. Walau bagaimanapun, ia kemudiannya dimaklumkan bahawa resolusi sedemikian akan diluluskan dengan resolusi khas (yang memerlukan majoriti 75%) dan bukan resolusi biasa, menurut G terma-terma surat ikatan amanah. Dengan itu, Pavilion Yields, Greenpower dan bank-bank masing-masing memfailkan tindakan untuk menentukan sama ada resolusi yang dicadangkan perlu dibuat melalui resolusi biasa atau khas. Bank-bank dan Kumpulan Tan Sri Lim kemudian bersetuju untuk menyelesaikan perkara itu, menjurus pada perintah persetujuan. Menurut H perintah persetujuan, bank-bank, pemegang amanah dan kumpulan Tan Sri Lim bersetuju, antara lain, untuk pemegang amanah menangguhkan lelongan salah satu tanah dan bahawa perayu kedua dan/atau pihak-pihak berkaitan dengannya akan merundingkan pembelian nota-nota yang dipegang oleh bank-bank. Terma-terma penyelesaian akhirnya dimuktamadkan di mana I tempoh masa untuk bayaran berperingkat dan penyelesaian jualan yang dicadangkan dipersetujui oleh pihak-pihak. Terma-terma muktamad dinyatakan dalam perjanjian jual beli ('PJB') dan jaminan ('jaminan') yang dimeterai antara bank-bank dan perayu-perayu. Perayu pertama membuat bayaran menurut PJB. Walau bagaimanapun, cek bagi ansuran keempat tak

laku mengakibatkan pengeluaran notis mengenai peristiwa keingkaran oleh bank-bank kepada perayu pertama dan menuntut perayu pertama meremedi keingkaran dalam tempoh 14 hari dari tarikh notis dihantar. Atas kegagalan perayu pertama meremedi keingaran itu, bank-bank meneruskan dengan pemfailan tindakan penguatkuasaan PJB dan jaminan. Sementara itu, seperti yang diperuntukkan bawah terma jelas SPA yang dipersetujui, dan berikutan arahan muktamad Kumpulan Tan Sri Lim yang diberikan kepada pemegang amanah, pemegang amanah meneruskan dengan tindakan gadaian untuk mendapatkan balik nota-nota tertunggak setelah dimaklumkan oleh bank-bank mengenai keingkaran bawah PJB. Tindakan bank-bank adalah untuk pelaksanaan spesifik bawah PJB untuk perayu pertama menyelesaikan pembelian nota-nota bank (atau secara alternatifnya, ganti rugi bawahnya) dan penguatkuasaan jaminan oleh perayu kedua bagi jumlah tertunggak dan terhutang bawah PJB manakala perayu-perayu menuntut balas terhadap bank-bank dan pemegang amanah. Mahkamah Tinggi membenarkan permohonan penghakiman terus oleh bank-bank terhadap perayu-perayu bagi jumlah likuidasi RM124,489,509.27 dan membatalkan tuntutan balas perayu-perayu terhadap bank-bank dan pemegang amanah.

Diputuskan, menolak rayuan-rayuan dengan kos:

(1) Pesuruhjaya kehakiman ('PK'), apabila menolak permohonan responden-responden untuk pelaksanaan spesifik, melaksanakan budi bicaranya seperti yang diperuntukkan oleh s 21 Akta Relief Spesifik ('Akta 1950'). Pesuruhjaya Kehakiman hanya enggan memerintahkan pelaksanaan spesifik tetapi sebaliknya memilih untuk memerintahkan ganti rugi kerana PK mengekalkan haknya untuk memerintahkan pampasan secara alternatif. Selanjutnya, s 18 Akta 1950 membenarkan mahkamah memerintahkan pampasan bagi kemungkiran kontrak, sebagai tambahan kepada, atau sebagai ganti, kepada seseorang yang memohon pelaksanaan spesifik. Oleh itu, tiada kritikan yang boleh dibuat terhadap responden-responden kerana menuntut pelaksanaan spesifik dan juga memohon ganti rugi untuk kemungkiran kontrak sebagai ganti pelaksanaan spesifik sebagai pelanggaran doktrin pilihan (lihat perenggan 37–39).

(2) Walaupun s 18 kelihatan dalam konflik dengan s 28, s 28 diguna pakai apabila guaman hanya untuk pelaksanaan spesifik. Seksyen 28 tidak diguna pakai untuk mengehadkan s 18 yang merupakan peruntukan spesifik yang membenarkan pampasan bagi kemungkiran (*Balbeer Singh a/l Karam Singh & Ors v Sentul Raya Sdn Bhd* [2014] 5 MLJ 491). Bank-bank tidak menuntut terhadap apa-apa kehilangan atau kerugian terasing atau tidak langsung atau apa-apa sebagai tambahan pada sesuatu yang dalam jangkaan pihak-pihak dalam kontrak. Baki harga belian yang dituntut oleh bank-bank adalah jumlah yang dipersetujui boleh dibayar oleh perayu-perayu jika perayu-perayu ingkar. Undang-undang matan

menyatakan bahawa sama ada jumlah yang dinyatakan dalam kontrak adalah penalti atau ganti rugi jumlah tertentu adalah soalan pentafsiran terma-terma dan hal keadaan setiap kontrak tertentu. Oleh itu, hujahan bahawa jumlah yang dinyatakan adalah penalti, tidak bermerit. Keputusan PK untuk mengawardkan baki harga belian sebagai pampasan konsisten dengan s 18 Akta 1950 kerana pentaksiran adalah dalam budi bicara mahkamah. Baki harga belian yang dituntut oleh bank-bank adalah jumlah yang dipersetujui kena dibayar oleh perayu-perayu akibat keingkaran perayu-perayu. Oleh itu, tiada keperluan untuk ganti rugi ditaksirkan seperti biasa kerana jumlah ganti rugi tertentu jika berlaku keingkaran telah dipersetujui (lihat perenggan 40 & 44–45).

(3) Pemegang amanah telah mematuhi perintah persetujuan dengan tidak meneruskan prosiding halang tebus bagi membolehkan perayu-perayu membuat perundingan. Hanya selepas keingkaran PJB, maka pemegang amanah memohon untuk meneruskan dengan prosiding halang tebus kerana itu adalah kewajipannya bawah surat ikatan amanah. Pemegang amanah bertindak bagi faedah pemegang-pemegang nota dan tindakannya adalah untuk mendapatkan balik jumlah tertunggak bawah nota-nota tanpa menghiraukan siapa pemilik nota-nota itu. Hasil yang diterima adalah untuk kesemua pemegang nota termasuk pelabur awam. Tiada pelanggaran oleh pemegang amanah atau konspirasi dengan bank. Pada hakikatnya, berikutan keingkaran perayu pertama bawah PJB, bank-bank mempunyai hak sah untuk pelaksanaan bawah PJB dan adalah tidak benar untuk menyatakan bahawa terdapat konspirasi oleh bank-bank dan pemegang amanah untuk menyebabkan kerugian kepada perayu-perayu. Pemegang amanah telah pada setiap masa bertindak secara munasabah dan mematuhi terma-terma bawah surat ikatan amanah, terma-terma dalam gadaian dan arahan pemegang-pemegang nota. Ini jelas dibuktikan melalui keterangan dokumentar yang tidak dipertikaikan. Mahkamah Tinggi oleh itu betul apabila memutuskan bahawa tuntutan balas perayu-perayu jelas tidak boleh dikekalkan. Dalam keadaan tersebut, tiada kekhilafan yang boleh dirayu untuk mewajarkan campur tangan mahkamah rayuan (lihat perenggan 47–49).]

Notes

For a case on sale and purchase agreement, see 3(4) *Mallal's Digest* (5th Ed, 2015) para 7330.

Cases referred to

Ardeshir H Mama v Flora Sassoon AIR 1928 PC 208, HC (refd)

Balbeer Singh a/l Karam Singh & Ors v Sentul Raya Sdn Bhd [2014] 5 MLJ 491, CA (refd)

Gopi Nath Sen And Ors vs Bahadurmul Dulichand And Ors AIR 1979 Cal 203, HC (refd)
Labasama Group (M) Sdn Bhd v Insofex Sdn Bhd [2000] 3 MLJ 310; [1996] 2 MLRA 665, CA (refd)
Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners) [2007] 5 MLJ 501; [2007] 4 CLJ 725, FC (refd)
Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known as Ekspidisi Ria Sdn Bhd) [2005] 4 MLJ 101, CA (refd)
Souster v Epsom Plumbing Contractors Ltd [1974] 2 NZLR 515, HC (refd)
Tan Meng San v Lim Kim Swee [1962] 1 MLJ 174, CA (refd)
Zaibun SA binti Syed Ahmad v Loh Koon Moy & Anor [1982] 2 MLJ 92, PC (refd)

Legislation referred to

Companies Act 1950 s 176
Contracts Act 1950 s 81
Rules of Court 2012 O 14, O 18 r 19(1)(a), (1)(b), (1)(d), O 81
Specific Relief Act 1950 ss 18, 18(4), 21, 28

Appeal from: Civil Trial No 22NCC-163–06 of 2015 (High Court, Kuala Lumpur)

Mark Ho (Jamie Wong and William Ch'ng with him) (Jamie Wong) for the first appellant.
Azhar Azizan Harun (Kelly Khoo, Teo Wee Shiuan and Lum Man Chan with him) (Malis & Khoo) for the second appellant.
Yoong Sin Min (Ng Hooi Huang and Michelle Wong with him) (Shook Lin & Bok) for the first to fifth respondents.
S Ramesh (PY Kam with him) (Adnan Sundra & Low) for the sixth respondent.

Harmindar Singh JCA (delivering judgment of the court):

[1] There are three appeals before us arising out of a decision by the High Court at Kuala Lumpur given on 5 October 2015. These appeals were ordered to be heard together.

[2] In essence, these three appeals are in respect of the decision by the High Court, firstly, to allow the sixth respondent's application to strike out the appellants' counterclaim ('Appeal 1816'), secondly, to allow the first to fifth respondents' application to strike out the appellants' counterclaim ('Appeal 1817'), and thirdly, to allow the first to fifth respondents' application to enter summary judgment against the appellants for damages in the sum of RM124,489,509.27.

A **[3]** These appeals were heard on 6 December 2016. After hearing submissions as well as considering the written submissions filed by all parties, the appeals were dismissed on the same day. Our reasons for so doing now follow and will form the judgment of the court.

B **[4]** For ease of reference, Million Westlink Sdn Bhd will be referred to as the first appellant and Tan Sri Dato' Lim Cheng Pow as the second appellant. The first to fifth respondents will collectively be referred to as 'the banks' and the sixth respondent, Universal Trustee (M) Bhd will be referred to as the 'trustee'.

C BACKGROUND FACTS

[5] In or around July 2002, one Gula Perak Bhd ('Gula Perak') issued five year Redeemable Convertible Secured Notes 2002/2007 with an aggregate nominal value of RM288,820,655 ('the notes'). The five banks hold about 48.54% of the notes. The remaining notes were initially held by four other financial institutions, as well as various other individuals with very small holdings of the notes ('the noteholders'). A trust deed dated 11 December 2002 ('the trust deed') was executed upon which the trustee was appointed as trustee for all the noteholders.

[6] Thereafter, the second appellant (formerly the Managing Director of Gula Perak) together with one Pavilion Yields Sdn Bhd ('Pavilion Yields') and one Greenpower Value Sdn Bhd ('Greenpower') acquired 50.25% of the notes from, inter alia, the other financiers. It is not disputed that Pavilion Yields and Greenpower are parties aligned to or connected with the second appellant and are friendly to Gula Perak and will collectively be referred to as 'the Tan Sri Lim Group'.

[7] As security for Gula Perak's liability under the notes, inter alia, the following lands were charged to the trustee, who holds the same as trustee for all the noteholders:

(a) two lots of lands in Kuala Lumpur ('the KL lands'), charged by Gula Perak;

(b) two lots of lands in Mukim Setapak, Kuala Lumpur, charged by Gula Perak;

(c) nine lots of lands in Selangor, charged by Gula Perak;

(d) four lots of lands in Kuala Lumpur upon which the Dynasty Hotel is located ('the Dynasty Hotel Lands') charged by Dynawell Corporation (M) Sdn Bhd ('Dynawell'). Dynawell is a wholly-owned subsidiary of Gula Perak; and

(e) land upon which the Empress Hotel is located in Sepang, Selangor ('the Empress Hotel Land') charged by KSB Requirements & Rest Sdn Bhd ('KSB'). KSB is a subsidiary of Gula Perak ('the charged lands').

[8] It then transpired that Gula Perak defaulted in its payments due to the noteholders under the notes and failed to redeem all the notes by the maturity date of 22 April 2008. As such, on 29 June 2010, a resolution was passed by the noteholders to declare that an event of default had occurred in respect of the notes and to direct the trustee to, inter alia, take all necessary actions to recover the amounts owing by Gula Perak under the notes, which included the realisation of all securities given to the trustee ('the 2010 resolution').

[9] Pursuant to and in accordance with the 2010 resolution, the trustee proceeded with charge actions in respect of the charged lands, to recover monies due to the noteholders. In this connection, the second appellant, Pavilion Yields and Greenpower each filed various applications to intervene in the charge actions in respect of the Dynasty Hotel Lands, the Empress Hotel Land and the KL lands to stop the trustee from proceeding with the same. The said intervener applications in respect of the aforesaid charge actions were all dismissed by the court.

[10] Subsequent thereto, various contributories of Gula Perak obtained or attempted to obtain numerous restraining orders purportedly under s 176 of the Companies Act 1950, on a ex parte basis, to restrain the trustee's and Noteholders' actions. Each of the ex parte orders were subsequently set aside. Such actions were filed in various towns, including in Shah Alam, Taiping, Seremban and Kuala Lumpur. Finally on 1 March 2013, Gula Perak was ordered to be wound up by the Shah Alam High Court and liquidators were appointed over Gula Perak.

[11] After failing in its attempts to stop the auctions of the charged lands, Pavilion Yields then, by its letter dated 19 February 2014 to the trustee, requested for a noteholders meeting to be convened for the purpose of passing, inter alia, an ordinary resolution to revoke the 2010 resolution and to direct the trustee to discontinue all legal actions in respect of the notes. The idea was that since the Tan Sri Lim Group held more than 50% of the notes, they could revoke the 2010 resolution by a simple majority.

[12] By notice dated 11 March 2014, the trustee notified the noteholders that it would be convening a noteholders meeting on 4 April 2014 to vote on the Pavilion Yields' proposed resolution. However, much to the chagrin of those who called for the meeting, it was also notified that such resolution was to be passed by a special resolution (requiring 75% majority) instead of an ordinary resolution, in accordance with the terms of the trust deed.

[13] Pursuant thereto, Pavilion Yields, Greenpower and the banks respectively filed the following actions to determine whether the proposed resolution was to be carried by way of an ordinary or special resolution:

(a) Pavilion Yields filed its action vide Kuala Lumpur High Court Originating Summons No 24NCC-99–03 of 2014 on 14 March 2014;

(b) the banks filed their action vide Kuala Lumpur High Court Originating Summons No 24NCC-113–03 of 2014 on 19 March 2014; and

(c) Greenpower filed its action vide Kuala Lumpur High Court Originating Summons No 24NCC-134–04 pf 2014 on 2 April 2014. Under Greenpower's action, Greenpower also applied to restrain the trustee from taking further recovery action and auctions of the charged lands including the public auction of the Dynasty Hotel Lands fixed on 14 April 2014.

[14] Be that as it may, the banks and the Tan Sri Lim Group then agreed to try to resolve the matter. This resulted in the consent order of 11 April 2014 entered in the above Greenpower action ('the consent order'). The other two suits were withdrawn. Pursuant to the consent order, the banks, the trustee and the Tan Sri Lim Group agreed, inter alia, for the trustee to postpone the auction of the Dynasty Hotel Lands on 14 April 2014 and that the second appellant and/or parties related to him would negotiate a buyout of the notes held by the banks.

[15] Thereafter, pursuant to lengthy negotiations, the settlement terms were finally resolved by letters dated 17 June 2014 (as varied by letter of 3 July 2014) issued by the banks' solicitors, Messrs Shook Lin & Bok, and accepted by the appellants vide letter dated 11 July 2014 from their solicitors, Messrs Ranjit Ooi & Robert Low. The timelines for the staggered payments and completion of the proposed sale, were agreed to by the parties through their solicitors. These terms were finalised and reflected in the sale and purchase agreement ('SPA') and the guarantee ('guarantee') executed between the banks and appellants, both dated 5 August 2014.

[16] Under the SPA, it was, inter alia, provided that:

(a) the first appellant (a company connected to the Tan Sri Lim Group) would purchase the banks' notes for a purchase price of RM146,458,246.20 ('the purchase price') with staggered payments to be made on due dates set out in the SPA. The last payment would be by 30 March 2015 (or by the extended deadline of three months thereafter if the banks agreed);

(b) the charged lands may be redeemed on conditions agreed upon by the banks as set out in the SPA and any sale proceeds payable to the Tan Sri Lim Group (as noteholders) shall be paid to the banks, towards reduction of the purchase price;

(c) the judgment which had been earlier obtained in the Kuala Lumpur High Court Civil Suit No D5-22–1128 of 2008 ('the put option judgment') by the first and second respondents against the second appellant to compel the second appellant to purchase a portion of the first and second respondents' notes, would only be deemed settled upon payment of the last instalment payable under the SPA (that is, when the SPA is completed). If there was a default under the SPA, the first and second respondents would be entitled to enforce the put option judgment;

(d) the second appellant was to guarantee the due performance of the SPA by the first appellant ('the guarantee'); and

(e) upon default under the SPA, the banks would be entitled to proceed concurrently to enforce the SPA and the guarantee, as well as for the trustee to proceed with the charge actions for recovery of the outstanding amounts under the notes. In this regard, the Tan Sri Lim Group issued their respective irrevocable instructions to the trustee to proceed with the charge actions upon receipt of notification from the banks of any default under the SPA.

[17] By the guarantee, the second appellant guaranteed, not merely as surety but as principal debtor, the due, punctual and full performance by the first appellant of its obligations and liability to pay the sums under the SPA.

[18] Pursuant to the SPA, the first appellant made payments on due dates of the 10% deposit of the purchase price (RM14,645,824.62), the second instalment (RM7,322,912.31) and the third instalment (RM14,645,824.62). On 30 December 2014, the first appellant furnished to the banks' solicitors a cheque for the sum of RM 36,614,561.55 for the payment of the fourth instalment due on 30 December 2014. However, the said cheque was dishonoured.

[19] The banks, through their solicitors, issued to the first appellant a notice of event of default dated 5 January 2015 in the payment of the fourth instalment and demanded the first appellant to remedy the said default within 14 days from the date of delivery of the said notice. The first appellant failed to remedy the default in payment of the fourth instalment. Instead, it sought the banks' indulgence to settle the same. Despite some negotiations, the appellants eventually failed to comply with the banks' terms for such requested extension

of time. The banks proceeded to file the present action in the High Court on 5 June 2015 to enforce the SPA and the guarantee.

[20] Meanwhile, as provided under the express agreed terms of the SPA, and in accordance with the irrevocable instructions of the Tan Sri Lim Group furnished to the trustee, the trustee continued with the charge actions for recovery of the outstanding notes upon notification by the banks of the default under the SPA.

AT THE HIGH COURT

[21] The banks' action filed in the High Court was a claim for specific performance of the SPA for the first appellant to complete its purchase of the banks' notes (or in the alternative, damages thereunder) and to enforce the guarantee by the second appellant for amounts due and owing under the SPA.

[22] The appellants, however, mounted a counterclaim against the banks and the trustee for, inter alia, the following:

(a) various declarations that the banks had breached the terms of the SPA and/or guarantee and that the appellants were entitled to stop payment for the fourth instalment or that the default notices issued by the banks are null and void;

(b) declaration that the timeline for performance of the SPA and/or guarantee is at large and an order that the appellants be given eight months (or such timeline directed by the court) to perform their obligations;

(c) declaration that the banks have unlawfully and unilaterally forfeited the deposit and the ex-gratia sum;

(d) declaration that the banks had dishonestly, and/or knowingly assisted and/or aided and abetted the trustee in relation to alleged breaches of its duty of care and/or fiduciary and/or statutory duties and/or trust obligations towards the first and/or second appellant and/or the noteholders;

(e) an injunction restraining the trustee from proceeding with the charge actions of the charged lands; and

(f) a permanent injunction restraining the first and second respondents from proceeding with the enforcement of the put option judgment.

[23] The banks then filed its application for leave to enter final judgment against the appellants for specific performance of the SPA and the guarantee, and further or in the alternative, for damages in the sum of

RM124,489,509.27 (balance purchase price) pursuant to O 14 and O 81 of the Rules of Court 2012 ('the ROC 2012'). A

[24] The banks and the trustee also filed their separate applications for the striking out of the appellant's counterclaim pursuant to O 18 r 19(1)(a), (b) and/or (d) of the ROC 2012. The banks' summary judgment application and the two striking out applications were heard together. B

[25] On 5 October 2015, the High Court made the following orders:

(a) summary judgment to be entered against the appellants for a liquidated sum of RM124,489,509.27 and costs of RM15,000 to be paid by the appellants to the banks; C

(b) the appellants' counterclaim against the banks to be struck out with costs of RM10,000 to be paid by the appellants to the banks; and

(c) the appellants' counterclaim against the trustee to be struck out with costs of RM10,000 to be paid by the appellants to the trustee. D

[26] The High Court granted the summary judgment premised on, amongst others, the following grounds: E

(a) the first appellant was not entitled to rely on the counterclaim as it was plain and obvious that the counterclaim was not sustainable against the banks. It was clear that the counterclaim is an afterthought which was only filed after the banks had commenced the proceedings herein; F

(b) there was no settlement agreement as alleged by the appellants (the consent order, SPA and guarantee form the premise of the settlement agreement);

(c) there was no alleged redemption mechanism as alleged by the appellants; G

(d) it was clear from the evidence that the banks and the trustee had not breached the SPA;

(e) it was clear from all the documentary evidence adduced by the banks and trustee that the first appellant was estopped from raising the alleged triable issues in this case by reason of the first appellant's conduct in presenting a dishonoured cheque and having made three applications for extension of time to the banks pursuant to the SPA; and H

(f) the banks were fully within their rights under the SPA to initiate concurrent proceedings, that is, concurrent enforcement of the suit herein; foreclosure proceedings over the charged lands and put option judgment against the second appellant. I

[27] The High Court granted the trustee's striking out order pursuant to

A O 18 r 19(1)(b) and (1)(d) of the ROC 2012 premised on, amongst others, the following grounds:

(a) the first appellant had no personal interest in the charged lands to file a counterclaim against the trustee;

B (b) there was no such thing as the settlement agreement as alleged by the appellants. As such, the trustee did not breach the alleged settlement agreement;

(c) the trustee did not owe any fiduciary, statutory, contractual and duty of C care to the appellants;

(d) there was no conspiracy and/or omission on part of the trustee which could constitute a conspiracy with the banks to injure and/or interfere with the appellants' contractual rights under the SPA;

D (e) the trustee did not cause the purchase of the Empress Hotel Land to be aborted nor was involved in any manner with the first appellant's default;

(f) the trustee could lawfully insist on the 75% majority requirement under the trust deed; E

(g) the counterclaim against the trustee did not raise any questions of fact or law which should go to trial;

(h) the counterclaim against the trustee is bound to fail and cannot be saved by any amendment; and F

(i) the counterclaim is frivolous and/or vexatious and an abuse of court process.

[28] The High Court granted the banks striking out order pursuant to O 18 G r 19(1)(b) and (1)(d) of the ROC 2012 premised on, amongst others, the following grounds:

(a) there was no such thing as the settlement agreement as alleged by the appellants. As such, the banks did not breach the alleged settlement H agreement;

(b) there was no such thing as the redemption mechanism as alleged by the appellants;

(c) the banks had not breached the SPA;

I (d) it was clear from all the documentary evidence adduced by the banks and the trustee that the first appellant was estopped from raising the alleged triable issues by reason of the first appellant's conduct in presenting a dishonoured cheque and having made three applications for extension of time to the banks pursuant to the SPA;

(e) there was no conspiracy and/or omission on the part of the banks which could constitute a conspiracy with the trustee to injure and/or interfere with the first appellant's contractual rights under the SPA;

(f) the banks and the trustee were wholly within their rights under the SPA to initiate concurrent proceedings, that is, concurrent enforcement of the suit herein; foreclosure proceedings over the charged lands and put option judgment against the second appellant;

(g) the banks and/or the trustee did not induce the first appellant's default under the SPA;

(h) the counterclaim against the banks did not raise any questions of fact or law which should go to trial;

(i) the counterclaim against the banks was bound to fail and cannot be saved by any amendment; and

(j) the counterclaim was frivolous and/or vexatious and an abuse of court process.

THE INSTANT APPEAL

[29] In respect of the orders obtained by the banks, the appellants raised several issues. The issues which merited consideration were as follows. The appellants argued, firstly, that after dismissing the banks' prayer against the first appellant for specific performance under O 81 of the ROC 2012, the learned judicial commissioner ('JC') did not have the jurisdiction and power to order against the first appellant, damages for the breach of the SPA under O 14 of the ROC 2012 when their application against the first appellant was premised or grounded upon O 81 and not O 14. Secondly, it was argued that in the event the High Court had the jurisdiction and power to order damages after the dismissal of specific performance application, the learned JC ought to have ordered against the first appellant, summary judgment for damages to be assessed instead of liquidated damages in the sum of RM124,489,509.29 taking into consideration the court was called to order damages for breach of contract and the fact that the order to pay RM124,489,509.29 was effectively a specific performance order.

[30] In this context, it was further submitted that the learned JC ought to have awarded damages in the sum to be assessed by the court as the cause of action in the case at hand is one of breach of contract. It was contended that the learned JC had instead embarked on an evaluation of the claim for damages under O 14 as if the respondents' claim was a recovery of loans. In other words, the learned JC had failed to consider that the cause of action of the respondents was not a breach of a contract of borrowings but rather a breach of a sales and purchase agreement.

[31] Thirdly, it was contended that when the claim for specific performance was dismissed, the respondents were barred or estopped from pursuing a claim for breach of contract against the first appellant by virtue of s 28 of the Specific Relief Act 1950 ('the SRA 1950') and the doctrine of election. It was accordingly submitted that since the second appellant's liability as guarantor was co-extensive with the liability of the first appellant by virtue of s 81 of the Contracts Act 1950, the second appellant's liability would also be extinguished in the event the first appellant was found not liable under the SPA.

[32] Taking all the issues together as they are somewhat related, it must be observed, at the outset, that these issues were never raised before the High Court and that is why a discussion of these issues in the already extensive judgment of the learned JC is absent. Nevertheless, as the issues involved essentially questions of law, they were considered as follows.

[33] In essence, what the appellants appear to be asserting is that when a claim for specific performance is not granted by the court, the claim for damages for breach of contract cannot be maintained. To support this proposition, the appellants relied on the cases of *Ardeshir H Mama v Flora Sassoon* AIR 1928 PC 208 ('Ardeshir'); *Gopi Nath Sen And Ors vs Bahadurmul Dulichand And Ors* AIR 1979 Cal 203 ('Gopi Nath Sen'); and *Labasama Group (M) Sdn Bhd v Insofex Sdn Bhd* [2000] 3 MLJ 310; [1996] 2 MLRA 665 ('Labasama').

[34] Now, a perusal of these cases showed a fundamental difference with the instant case. The effect of the case of *Ardeshir* was discussed by the then Court of Appeal in *Tan Meng San v Lim Kim Swee* [1962] 1 MLJ 174 where it was observed (at p 178):

> There is a wide distinction between the present case and the case of *Ardeshir H Mama v Flora Sassoon* which was cited by Mr Hills. In that case the suit was in its inception an action for specific performance of a contract for the sale of land with claims for damages in addition or in the alternative. The claim for specific performance was later abandoned by the plaintiff who at the trial claimed damages for breach of contract. In the judicial committee Their Lordships (per Lord Blanesburgh) discussed at some length the history of the equitable relief of specific performance, and considered the effect of s 19 of the Indian Specific Relief Act (s 18 of our Ordinance) in the light of decisions on s 2 of Lord Cairns' Act. The conclusion at which Their Lordships arrived was that where a claim for specific performance of a contract is joined with a claim for damages for breach of the contract and the claim for specific performance is abandoned, there is no power in the court to award damages without an 'apt and sufficient amendment of the plaint'. The position in the present case is, however, quite different, for here the respondent has never expressly abandoned his claim for performance and his election to sue on a severable part of the contract, as he did in Civil Suit No 51 of 1959, does not in the circumstances amount to an implied abandonment of that claim.

[35] As for *Gopi Nath Sen*, it is authority for the proposition that once a suit for specific performance fails by reason of the fact that the claim for specific performance was not pressed or was abandoned at the trial, the question of damages for specific performance in substitution also fails (at p 203). As for *Labasama*, it was also a case where the prayer for specific performance had been abandoned after the initial payment of RM136,000 for purchase of land had been reimbursed by the appellant.

[36] We note, however, that in the present case, the respondents were all along insistent on their claim for specific performance and had never abandoned it. The claim for specific performance, in the end, and after lengthy submissions, was not granted as the learned JC in the main considered that specific performance ought not to be ordered as damages for breach of the SPA would be an adequate remedy for the respondents here. For this reason, the cases cited by the appellants are of no assistance. After declining to order specific performance, the learned JC was entitled to consider the award of damages.

[37] Now much was also made of the order of the learned JC of having 'dismissed' the prayer for specific performance. In our view, this is of little consequence as essentially the learned JC was exercising his discretion as afforded by s 21 of the Specific Relief Act 1950 ('the SRA 1950'); see also *Zaibun SA binti Syed Ahmad v Loh Koon Moy & Anor* [1982] 2 MLJ 92. So his order of dismissal was unfortunate as in effect, as was explained in the written judgment, the learned JC was merely declining to order specific performance and instead chose to order damages. It was not a case where the remedy of specific performance was not available to the respondents at the outset. It must therefore follow that the learned JC retained the right to order compensation in the alternative.

[38] In this context as well, we observe that no criticism can be levelled at the respondents for mounting their claim for specific performance and also seeking damages for breach of contract in lieu of specific performance as a sort of breach of the doctrine of election. This seeming inconsistency was perhaps best explained by this court in *Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known as Ekspidisi Ria Sdn Bhd)* [2005] 4 MLJ 101 citing with approval the following passage in *Souster v Epsom Plumbing Contractors Ltd* [1974] 2 NZLR 515 at p 521:

> Where a party seeks a decree of specific performance, he is in fact approbating the contract and seeking damages as an alternative remedy. With perfect consistency such a plaintiff is entitled to maintain at the hearing of the action that the contract is on foot (and it does remain on foot until the moment when specific performance is refused and damages are awarded instead). The logic in the judgment of Scholl J would be hard to refute, for if the damages are to be regarded as damages for the loss

A of a bargain brought to an end by the action of the court in refusing specific performance there is only one time at which they should be determined, and that is when the bargain for which they are intended as compensation is brought to an end. Until the contract is brought to an end by the action of the court, the contract remains on foot.

B

[39] In any case, s 18 of the SRA 1950 permits the court to order compensation for breach of contract, in addition to, or in substitution, to a person seeking specific performance. Section 18, shorn of the illustrations, is reproduced as follows:

C

18 Power to award compensation in certain cases

(1) Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, its performance.

D

(2) If in any such suit the court decides that specific performance ought not to be granted, but that there is a contract between which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

E

(3) If in any such suit the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

(4) Compensation awarded under this section may be assessed in such manner as the court may direct.

F

(5) The circumstance that the contract has become incapable of specific performance shall not preclude the court from exercising the jurisdiction conferred by this section.

G

[40] Now this may, at first glance, appear to be in conflict with s 28 of the SRA 1950 which states that 'the dismissal of the suit for specific performance of a contract shall bar the plaintiff's right to sue for compensation for the breach of the contract or part, as the case may be'. However, this court in *Balbeer Singh a/l Karam Singh & Ors v Sentul Raya Sdn Bhd* [2014] 5 MLJ 491 had observed

H

that there is no such conflict. It was held there that s 28 applies where the suit is only for specific performance and s 28 does not apply to restrict s 18 which is a specific provision authorising compensation for breach.

I

[41] Coming now to the order of the learned JC in awarding damages in the form of the balance of the purchase price, the appellants contended that such award cannot be made without the banks having proved the loss of the sum of RM124,489,509.27 as provided in s 18(4) of the SRA 1950.

[42] With respect, we found no merit in this argument as the sum of damages which was awarded by the High Court was in fact the amount agreed to be paid by the appellants for the breach of the SPA. This can be seen from the following clauses in the SPA and guarantee:

(a) cl 9.1 of the SPA:

> In the event of default by the Purchaser and/or Tan Sri Lim ... the Vendors shall forthwith and without any further reference to the Purchaser be entitled to concurrently take the following actions ...
>
> (a) pursue the Purchaser and Tan Sri Lim under this Agreement and Guarantee respectively for all the sums due under this Agreement and for the avoidance of doubt, payment of all sums payable under this Agreement shall be become immediately due and payable upon the occurrence of an event of default by the Purchaser and/or Tan Sri Lim under this Agreement;

(b) cll 2.1 and 2.2 of the guarantee where the second appellant irrevocably and unconditionally guarantees the due and full performance by the first appellant of its obligation and liability to pay the sums under the SPA. Upon default under the SPA, the second appellant will on demand pay all sums due and unpaid under the SPA;

(c) cl 10 of the guarantee: the second appellant shall indemnify the banks against all costs and expenses including legal costs (on a solicitor and client and full indemnity basis) in connection in enforcing the performance of the second appellant's obligations under the guarantee; and

(d) cl 14 of the guarantee: a certificate by the authorised officer of each of the banks as to the indebtedness due and owing by the appellants to the banks shall be conclusive evidence against the appellants.

[43] In this context, we agree that the banks are not claiming for any remote and indirect loss or damage or anything in addition to what was within the contemplation of the parties to the contract. The balance purchase price claimed by the banks is the agreed sum payable by the appellants in the event of the appellants' default.

[44] If the concern is that the stipulated sum is a penalty, then the argument is also without merit. It is trite law that whether a sum stated in a contract is a penalty or liquidated damages is a question of construction of the terms and circumstances of each particular contract. In *Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners)* [2007] 5 MLJ 501; [2007] 4 CLJ 725, the Federal Court stated (at p 540 (MLJ); p 787 (CLJ)):

> Further, it is trite law that the burden to prove that a specified sum or stipulation is

A a penalty is upon the party sued for its recovery (see: *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428). And in our view the mere use of formula in calculating the sum payable does not necessarily mean that it can never be a 'sum named in a contract' for the purposes of s 75. It is a matter of construction premised in its 'terms and inherent circumstances, judged of as at the time of the making' of the B agreement, not as at the time of the breach. In other words it 'depends on the intention of the parties to be gathered from the whole of the contract. If the intention is to secure performance of the contract by the imposition of a fine or penalty, then the sum specified is a penalty; but if, on the other hand, the intention is to assess the damages for breach of the contract, it is liquidated damages' (see: *Law v Redditch Local Board* [1982] 1 QB 127).

C

[45] In the premises, the learned JC was not in error when he decided to award the balance of the purchase price as compensation. This is consistent with s 18(4) of the SRA 1950 as assessment is left to the discretion of the court. D As stated earlier, the balance purchase price claimed by the banks is the agreed sum payable by the appellants resulting from the appellants' default. There was therefore no necessity for damages to be assessed in the usual way as liquidated damages in the sum of RM124,489,509.29 was agreed in the event of default.

E **[46]** Finally, there is the appeal against the order obtained by the trustee. The crux of the appellants' complaints in this regard are that the trustee, in proceeding with the foreclosure proceedings of properties charged by Gula Perak, had breached an alleged settlement agreement. The appellants also alleged that the trustee had induced the appellants to breach the SPA and have F conspired with the banks.

[47] In this connection, we found no reason to disagree with the findings of the High Court. The undisputed documentary evidence showed that the trustee had complied with the consent order by not proceeding with the G foreclosure proceedings in order to enable the appellants to enter into negotiations. It was only after the default of the SPA that the trustee applied to continue with the foreclosure proceedings as was its duty under the trust deed.

[48] It cannot be disputed that the trustee acts for the benefit of the H noteholders. The trustee's actions are to recover the amounts outstanding due under the notes regardless of who are the owners of the notes. Proceeds recovered would be for all noteholders including public investors. The learned JC was right to conclude that there was no breach by the trustee or conspiracy with the banks. In fact, in view of the first appellant's default under the SPA, the I banks had a legitimate right of enforcement under the SPA and it is farfetched to assert that there was a conspiracy by the banks and the trustee to injure the appellants. In short, the trustee had at all times acted reasonably and in compliance with the terms under the trust deed, the terms of the charge and the instructions of the noteholders. This was clearly established by the undisputed

documentary evidence. The High Court was therefore right to conclude that the appellants' counterclaim was obviously unsustainable.

CONCLUSION

[49] In the circumstances, and for the reasons we have stated, there was no appealable error to warrant appellate interference. All the appeals were accordingly dismissed with costs to be paid by the appellants to respondents in the sum of RM20,000 for each appeal subject to payment of allocator fees. The deposits were ordered to be refunded.

Appeals dismissed with costs to be paid in the sum of RM20,000 for each appeal subject to payment of allocator fees.

Reported by Afiq Mohamad Noor